No. 8412

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

6

HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as copartners doing business under the firm name and style of H. Rothstein & Son (a copartnership),

Appellants,

vs.

GEORGE N. EDWARDS, as receiver in equity of Golden State Asparagus Company (a corporation),

Appellee.

APPELLANTS' OPENING BRIEF.

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Appellee.

APPELLANTS' OPENING BRIEF.

INTRODUCTION.

This action was tried before a jury, which rendered a verdict in the sum of $7504.02 in favor of plaintiff and appellee, a resident of the State of California, and against defendants and appellants, residents of the State of Pennsylvania. From the judgment of the United States District Court for the Northern District of California entered upon the said verdict, appellants have prosecuted this appeal. The complaint alleged that appellants breached an alleged con-

tract in writing (consisting of two telegrams) to purchase all of the bunch asparagus to be grown by appellee during the 1934 season up to and including April 10, 1934, at a price of $2.00 per crate f. o. b. cars Isleton, by refusing to furnish a sufficient bank guarantee, guaranteeing to appellee payment of the purchase price; that the difference between the market or current price for the asparagus available for delivery and the contract price, was the sum of $7074.15, which amount appellee claimed as damages. (Tr. pp. 4-5.) Appellants denied execution of the alleged written contract, and denied that appellee had suffered damages as alleged. (Tr. p. 6.)

JURISDICTION.

District Courts of the United States have original jurisdiction of all suits of a civil nature between citizens of different states where the matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.00.

28 *U. S. C. A.,* Section 41.

The Circuit Courts of Appeals of the United States have appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts in all cases, save where a direct review of the decision may be had in the Supreme Court under Section 345.

28 *U. S. C. A.,* Section 25.

ASSIGNMENT OF ERRORS RELIED UPON.

For the purpose of this appeal, appellants rely upon Assignments of Error Nos. 2, 3 (Tr. p. 212); 4, 5, 6 (Tr. p. 213); 8, 9, 11, 12 (Tr. p. 214); 13, 14 (Tr. p. 215); 15, 16 (Tr. p. 216); 21, 22, 23 (Tr. p. 218); 33, 34 (Tr. p. 225); 37 (Tr. p. 226).

STATEMENT OF FACTS.

George N. Edwards, the plaintiff and appellee, is the receiver in equity of the Golden State Asparagus Company, a corporation, whose principal business is farming. Henry Rothstein, M. H. Rothstein and I. Rothstein, as copartners trading as H. Rothstein & Sons, the defendants and appellants, have been engaged in the wholesale fruit and produce business in Philadelphia for the past 30 years.

In the latter part of January, 1934, M. H. Rothstein and Ben Krasnow, an employee of H. Rothstein & Sons, called on Edwards at his office in Oakland, and arranged an appointment to be held on February 10, 1934, at Isleton, where a part of the farming lands of the receivership estate were located.

Negotiations were had for the purchase of the estate's asparagus by H. Rothstein & Sons. The parties discussed the general details concerning the manner in which shipments were to be made, and it was stated that just bunch asparagus was to be shipped. (Tr. pp. 17, 18.) The specifications of the bunch asparagus were discussed and it was stated that

the asparagus would be similar to that which had theretofore been purchased by H. Rothstein & Sons through Garin, which had complied with the specifications of the State Department of Agriculture. (Tr. p. 35.)

Edwards asked a price of $2.00 a crate f. o. b. cars at Isleton. Rothstein then said that he was going to Seattle and Edwards gave him 48 hours within which to accept or decline the sale at that price. Within 48 hours thereafter, Krasnow telephoned the appellee that H. Rothstein & Sons would accept all asparagus available for shipment between the opening of the season and April 10th at the price quoted. (Tr. p. 18.) Krasnow asked the appellee to wire Mr. M. H. Rothstein at Seattle confirming the sale. Edwards then sent the following telegram:

> "Will confirm sale to H. Rothstein and Son all asparagus shipped from Golden State Asparagus Co. up to and including Apr 10 34 $2 per crate fob cars Isleton providing satisfactory bank guarantee is given immediately that all drafts against shipments will be paid wire answer 801 Jones Avenue Oakland
>
> Geo N Edwards Receiver
> Golden State Asp. Co."
>
> (Plaintiff's Exhibit No. 2. Tr. pp. 19-20.)

to which Rothstein wired in reply:

> "Answering will arrange guarantee payments all bunch asparagus price mentioned expect return San Francisco last this week or first next week don't worry when we make deal with you

will go through with same can draw up contract my arrival meantime figuring deal confirmed
M. H. Rothstein."
(Plaintiff's Exhibit No. 3. Tr. p. 21.)

The appellee bases his cause of action on these two telegrams, asserting that they constitute a contract in writing.

Edwards testified that he showed these two telegrams to Messrs. Dinkelspiel & Dinkelspiel, his attorneys as receiver, and instructed them to draw up a contract and submit it to Rothstein for his signature. (Tr. p. 30.) Thereafter, on February 19th, a conference was held in Dinkelspiel & Dinkelspiel's office, at which conference M. H. Rothstein, Krasnow, Edwards and Mr. Martin Dinkelspiel were present. Edwards told Rothstein that the meeting was for the purpose of arranging the bank guarantee. (Tr. pp. 22, 23, 112.) He told Rothstein that he estimated that there would be about 20,000 crates of bunch asparagus available and that he should be given an irrevocable letter of credit for $40,000.00 so that he could draw against appellants' bank as shipments were made or in the alternative that he should be given a $40,000.00 bank guarantee so that he would be assured of payment. (Tr. pp. 113, 133.) Dinkelspiel testified that Rothstein refused to furnish such a guarantee (Tr. pp. 113, 114), and that he then read various clauses from the Garin contract (Defendants' Exhibit No. 5; Tr. p. 86) and that he told Rothstein that the only thing between them was the question of the guar-

antee. (Tr. p. 114.) He asked Rothstein if it would be possible for him to furnish a small letter of credit and some sort of a surety bond. Rothstein said that he would see if he could obtain a $5000.00 surety bond. Dinkelspiel, at Rothstein's request, dictated the following telegram (Defendants' Exhibit No. 1) to Rothstein's home office:

> "Necessary place five thousand dollar faithful performance bond with Edwards receiver Golden State Asparagus Company Stop Notify your surety company have their San Francisco agent write bond and communicate with Martin Dinkelspiel Golden States attorney
>
> M. H. Rothstein."

(Tr. p. 33.)

Dinkelspiel then told Rothstein that he would draft a contract and have it ready when Rothstein returned in the afternoon. At the afternoon conference Dinkelspiel told Rothstein that he had conferred with certain of the creditors of the receivership estate and that they would not approve any transaction with H. Rothstein & Sons on a guarantee or surety bond of $5000.00, and that therefore he had taken the liberty of inserting in the written contract a provision providing for a $5000.00 surety bond and a $5000.00 letter of credit which was to be maintained at all times at $5000.00. Rothstein said that he would not sign any such contract nor give any surety bond. Dinkelspiel then asked Rothstein whether he would put up a $10,000.00 surety bond, stating that if that were done they could probably make a deal. Rothstein replied that he would not put up any surety

bond and that they would have to deal with him on his credit or not at all. (Tr. pp. 121-122.)

Edwards then said that he guessed they could not trade with Rothstein and they shook hands, and Rothstein and Krasnow left the meeting. (Tr. p. 122.)

The asparagus belonging to the receivership estate, which it is alleged that appellants had contracted to buy, was consigned by appellee through one Roper to various dealers and commission men in the east. (Tr. p. 36.) Edwards testified that 15,161 crates of bunch asparagus were shipped and the sum of $22,547.85 was the net amount received therefor. At $2.00 a crate the receiver would have obtained $30,322. The difference between the amount which he claimed he had received and this sum is the amount claimed as damages. (Tr. pp. 23-24.)

The record, however, discloses that an undetermined sum in excess of $22,547.85 was received by the appellee from the sale of this asparagus. (Tr. p. 161.)

ARGUMENT.

It is the contention of appellants that the two telegrams (Plaintiff's Exhibits Nos. 2 and 3) did not constitute a contract in writing; that there was a fatal variance between the proof and the pleadings; that the motion of the appellants for a directed verdict should have been granted; that there was a failure of proof as to the alleged damages.

I.

THE TWO TELEGRAMS (PLAINTIFF'S EXHIBITS NOS. 2 AND 3) DID NOT CONSTITUTE A CONTRACT IN WRITING.

The following assignments of error charge that the two telegrams (Plaintiff's Exhibits Nos. 2 and 3) did not constitute a contract in writing, and therefore the assignments will be treated as one:

> The court erred in holding that there was any evidence of a contract upon the part of defendants sufficient to go to the jury in that the uncontradicted evidence discloses that plaintiff and defendants had never entered into a contract as alleged in plaintiff's complaint, or at all. (Assignment of Error No. 4, Tr. p. 213.)
>
> That the evidence is insufficient to support the verdict and judgment in that it shows that plaintiff and defendants never entered into a contract for the sale of asparagus and that plaintiff had failed to prove the damages alleged to have been suffered by him. (Assignment of Error No. 6, Tr. p. 213.)
>
> That the verdict and judgment are contrary to law in that the two telegrams ''Plaintiff's Exhibits 2 and 3'', upon which plaintiff based the contract in writing alleged in his complaint, did not constitute a sufficient writing within the meaning of the statute of frauds to make a written contract. (Assignment of Error No. 33, Tr. p. 225.)
>
> That the verdict and judgment are contrary to law in that the telegram sent by defendants to plaintiff, ''Plaintiff's Exhibit 3'', did not constitute an acceptance in writing of plaintiff's offer, ''Plaintiff's Exhibit 2'', in that plaintiff offered to sell all shipping asparagus if a satisfactory bank guarantee was given, whereas the defendants offered to buy all bunched asparagus and to give a satisfactory guarantee. (Assignment of Error No. 34, Tr. pp. 225-226.)

The alleged contract being one for the sale of goods of a value in excess of $500.00, it was governed by Section 1724 of the Civil Code of the State of California, which section reads:

"§1724. Statute of Frauds. (1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold and actually receive the same, and give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; * * *".

The Supreme Court of the State of California has defined the requirements necessary to enable a note or memorandum in writing to conform to the requirements of the statute of frauds, in the following terms:

"To satisfy the Statute of Frauds, a memorandum 'must contain the essential terms of the contract expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intentions of the parties.' (5 Browne on Statute of Frauds, Section 371.)"

Seymour v. Oelrichs, 156 Cal. 782.

More definitely stated, the memorandum must show a concluded contract. In *Kling v. Bordner,* 61 N. E. 148, at 150, the Supreme Court of Ohio stated:

> "The memorandum which the statute requires 'to be in writing', is, to use its language, a memorandum of the 'agreement' between the parties; and it is now well settled, as held by Chancellor Kent in Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273, that the memorandum in writing, 'to be valid within the statute of frauds, must not only be signed by the party to be charged, but must contain the essential terms of the contract, expressed with such clearness and certainty that they may be understood from the writing itself, or some other paper to which it refers, without the necessity of resorting to parol proof.' The rule is not less explicitly stated in Reed, St. Frauds, par. 392, as follows: 'First, the memorandum must show an agreement, that is to say, a concluded contract; secondly, it must be intended as evidence of such contract; and, thirdly, it must show the whole contract. A contract, then, must be shown by the writing, in which the minds of the parties have met. The memorandum must be so reasonably certain and definite in itself that the contract can be made out without requiring additional proof in parol. "It must contain such words as will enable the court, without danger of mistake, to declare the meaning of the parties; it must obviate the necessity of going to oral testimony and relying on treacherous memory as to what the contract itself was." ' "

The requirement that the memorandum disclose a completed contract was recognized by the Supreme

Court of California, in *Breckinridge v. Crocker,* 78 Cal. 529, wherein the court stated:

> "The burden is on plaintiff to show by the writings that a contract, definite and certain in its terms, was entered into between the parties, and failing to do that, he must fail to obtain any relief."

In *Wristen v. Bowles,* 82 Cal. 84, the court stated:

> "It is for the court to determine whether letters which have passed between parties constitute an agreement between them. * * * These letters certainly did not. To constitute a binding contract made in this form, there must be a proposal squarely assented to. If the acceptance be not unqualified, or go not to the actual thing proposed, then there is no binding contract. * * * A proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection of the offer. * * * An offer imposes no obligation, unless it is accepted upon the terms upon which it was made. * * * An acceptance must be absolute and unqualified. A qualified acceptance is a new proposal. (Civ. Code, Sec. 1585.)"

In *Leach v. Weil,* 114 N. Y. S. 234, the court stated:

> "It does not suffice that the writing evidence a contract. It must embody the terms of the contract actually made."

It is the contention of appellants that the two telegrams (Plaintiff's Exhibits 2 and 3) relied upon by appellee to prove the alleged written contract do not constitute a contract in that:

(1) The writings do not show an absolute and unqualified acceptance by appellants of appellee's offer;

(2) The writings do not show a meeting of the minds as to the subject matter of the alleged contract and the terms thereof;

(3) The provisions of the alleged writings were not mutually binding upon both appellee and appellants;

(4) The writings disclose a counter-offer by appellants which amounted to a rejection of appellee's offer, and which counter-proposal was not accepted by appellee in writing.

The question of whether or not the above telegrams constituted a contract in writing was a question of law for the court to determine.

Code of Civil Procedure, State of California, Section 2102.

"It is for the court to determine whether letters which have passed between parties constitute an agreement between them. (Luckhart v. Ogden, 30 Cal. 547.) These letters certainly did not."

Wristen v. Bowles, 82 Cal. 84.

"The question of law, whether these writings constitute a contract, and, if so, whether they satisfy the provisions of the statute of frauds, survives the unanimous decision of the Appellate Division, and is subject to review by this court."

Pool v. Brunswick-Balke-Collender Co. (Court of Appeals of New York), 110 N. E. 619, 620.

(1) The writings do not show an absolute and unqualified acceptance by appellants of appellee's offer.

Appellee's telegram (Plaintiff's Exhibit No. 2) offered to sell to appellants "all asparagus shipped from Golden State Asparagus Co. up to and including April 10, 1934, $2.00 per crate f. o. b. cars Isleton, providing satisfactory bank guarantee is given immediately that all drafts against shipments will be paid." To this offer appellants replied by telegram "answering will arrange guarantee payment all bunch asparagus price mentioned." (Plaintiff's Exhibit No. 3.) It must be conceded that unless the terms "all asparagus" and "all bunch asparagus" have an identical meaning and unless the words "satisfactory bank guarantee" and the words "guarantee payment" have an identical meaning, appellants did not make an unqualified acceptance of the offer of appellee, but instead made a counter-proposal, which amounted to a rejection of appellee's offer.

In order to determine the *meaning of the technical words* used by the parties in the respective telegrams, the trial court properly permitted the introduction of parol testimony to show the meaning these words had in the produce trade.

In *American Sugar Refining Co. v. Colvin Atwell & Co.,* 286 Fed. 685, the District Court of Pennsylvania stated at page 687:

> "Reading into a contract the true meaning of technical terms, familiar to and used by the parties to a contract, is in no sense supplying by parol a missing term of the agreement. Such trade usage or meaning is supposed to have been in the minds

of the parties when the contract was made, and hence the real meaning of the words becomes a part of the contract. When the words 'basis 22.50' are thus explained by the averments of the declaration, it would seem that every grade or package of sugar available for selection is specified. Neither the parol evidence rule nor the statute of frauds is violated by reading into a contract a translation of technical terms used into words of general understanding. This principle is set forth in Franklin Sugar Refining Co. v. Howell, 274 Pa. 190, 118 Atl. 109. * * * the court said:

> 'Every agreement is made and to be construed with due regard to the known characteristics of the business to which it relates, * * * and hence the language used in a contract will be construed according to its purport in the particular business, although this results in an entirely different conclusion from what would have been reached, had the usual meaning been ascribed to those words. * * *.' "

In connection with the meaning of the words "all bunch asparagus" and "all asparagus", appellee testified that the term "bunch asparagus" is a common term used on the market; that bunch asparagus is asparagus not less than ⅜ths of an inch in diameter, 9 inches long, with 6 to 7 inches of green on the stalk, and with fairly close heads, which is put in bunches with a press and tied with a ribbon; that bunch asparagus did not include crooked or seeded heads or crooked spears or small sizes. (Tr. pp. 18, 19, 40, 41.) Appellee further testified that the shipping of bunch asparagus would involve a less number of crates than if all

of the asparagus was shipped, and that there are other classes of asparagus than bunch asparagus. (Tr. p. 35.)

H. P. Garin, called as a witness by the appellants, testified that for about 30 years he had been engaged in the produce business, farming and shipping vegetables, and was familiar with the custom and usage generally prevailing in the asparagus industry. (Tr. p. 46.) As to the terms used in the telegrams, the witness testified that according to custom and usage in the asparagus trade there is a difference between the terms "all asparagus" and "all bunch asparagus". There is a loose pack of asparagus, and a bunch pack, and six grades of bunch pack, the colossal, jumbo, extra fancy, fancy, select and extra select. (Tr. pp. 48-49.)

Walter S. Markham, called as a witness for the appellants, testified that for about 20 years he had been in the shipping and brokerage business, distributing vegetables. (Tr. p. 50.) Regarding the terms used in the telegrams, the witness testified that the term "bunch asparagus" according to custom and usage in the trade means generally asparagus of sufficient quality to justify bunching, packed in containers with certain sized dimensions, and with minimums as to size. The term "all asparagus" according to custom and usage in the trade means everything produced, culls, crooks, seeded heads, anything that could be cannery asparagus or loose asparagus or bunch asparagus. (Tr. pp. 62-63.)

Appellant, M. H. Rothstein, testified that he was a member of the firm of H. Rothstein & Son. Regarding the terms used in the telegrams he testified that in

accordance with the custom and usage of the trade he understood the term "all asparagus" to mean all the asparagus grown and delivered as the grower saw fit. (Tr. p. 69.)

It is apparent from the foregoing testimony that there is a difference between the meaning of the words "all asparagus" and "all bunch asparagus", in that "all asparagus" means the entire crop of asparagus grown, whereas the term "bunch asparagus" designates a particular portion of the crop that complies with certain specifications. Therefore, appellants' telegram (Plaintiff's Exhibit No. 3) was not an absolute and unqualified acceptance of the offer contained in appellee's telegram. (Plaintiff's Exhibit No. 2.) The telegrams on this ground alone failed to constitute a written contract.

> "An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal."
>
> *California Civil Code,* Section 1585.

In *Washington Ice Co. v. Webster,* 62 Maine 341, 359, the question before the court was whether or not certain writings constituted a written contract within the meaning of the statute of frauds. The court stated:

> "The case of Carter et al. v. Bingham, 32 Up. Can. R., 615, is in point. It was an action for non-delivery of fifteen bales of hops alleged to have

been sold by defendant to plaintiffs, the evidence showing that in conversation with one of the plaintiffs about the purchase of hops, defendant said he would sell at twenty cents per pound, and would keep the offer open for a few days. Subsequently, on the 17th of August, plaintiffs telegraphed defendant, 'will take 15 to 20 bales *good* new hops at 20 cents, cash.' On the 21st, defendant replied by telegram, 'Your offer accepted. Have booked your order for fifteen bales new hops, for delivery when picked.' * * *

Held, I. That there was no binding contract at any time between the parties, for the defendant's answer of the 21st of August, was not a simple acceptance of the plaintiffs' offer of the 17th, *but qualified it both as to quality (by leaving out the word good)*, and as to time of delivery; and assuming defendants' telegram of the 16th of September to be a renewal of such acceptance, the plaintiffs' subsequent telegram did not show an assent to it. In delivering the opinion of the court, Morrison, J., says: 'The rule of law I take to be, that an acceptance of a proposition must be a simple and direct affirmation, in order to constitute a contract, and if the party to whom the offer or proposition is made, accepts it adding any condition, with any change of its terms or provisions, which is not altogether immaterial, it is no contract until the party making the offer, consents to the modifications; that there can be no contract which the law will enforce until the parties have agreed upon the same thing in the same sense.' The agreement must be entire—as to the thing sold, its price, the time of delivery, and the terms of payment. In the present case, no such agree-

ment is shown. To the same effect are the cases of Sievewright v. Archibald, 17 Q. B. 103; Gether v. Capper, 14 Q. B. 39; Hamilton v. Terry, 11 C. B. 954." (Italics ours.)

It is apparent from the above case, which is analogous to the case at bar, that appellants' telegram was not an unqualified acceptance of the offer contained in appellee's telegram.

As the words "satisfactory bank guarantee" and "will arrange guarantee" on their face appear to be contrary terms, the burden was upon appellee to show that the terms had identical meanings. (See *Breckinridge v. Crocker,* 78 Cal. 529, supra.) Nowhere in the record is there one iota of testimony that the words have the same meaning, and it is apparent that nowhere in appellants' telegram (Plaintiff's Exhibit No. 3) did appellants agree to provide a satisfactory *bank* guarantee. Upon this ground alone there could be no acceptance of appellee's offer.

(2) The writings do not show a meeting of the minds as to the subject matter of the alleged contract and the terms thereof.

If, for the purpose of argument, it is conceded that appellants agreed to provide a satisfactory bank guarantee as requested by appellee, appellants ask this question: Where, in either appellee's or appellants' telegram, does it appear how much in dollars and cents would constitute a satisfactory bank guarantee? Or, where in either telegram does it appear how much asparagus would be shipped, from which the monetary amount necessary to provide a satisfactory bank guar-

antee could be ascertained without recourse to parol testimony?

It is evident that neither the appellee, the appellants, any expert witness, nor the court, could tell from an examination of the telegrams the monetary amount appellants would have had to provide in order to comply with the provisions of appellee's offer as to the satisfactory bank guarantee. It is therefore impossible to determine in what particulars appellants breached the alleged contract. The complaint alleges that appellants breached the contract by failing to provide a satisfactory bank guarantee. (Tr. p. 4.) The statute of frauds requires that all of the material elements of the contract be contained in the writings. The very gravamen of appellee's alleged cause of action is unascertainable from the writings relied upon, namely, the amount of the satisfactory bank guarantee appellants failed to provide. The telegrams (Plaintiff's Exhibits 2 and 3) therefore upon this ground failed to constitute a contract.

In *Winburgh v. Gay,* 27 Cal. App. 603, the memorandum upon which plaintiff sought to predicate a cause of action read as follows:

> "Mr. Winburgh:
>
> I will lease to you the stores now occupied by the Union Title & Trust Co. for five years, beginning Jan. 1, 1911. $250 for the first two years and $275.00 for the following three years. Usual clauses in lease to rebuilding.
>
> John H. Gay."

The court affirmed the decision of the lower court that the complaint failed to state a cause of action and held that the phrase "usual clauses in lease to rebuilding" was uncertain, and that the memorandum signed by the defendant was too uncertain to form a basis for that meeting of the minds or mutual assent which is necessary to constitute a contract. The court further held that the terms of the proposed agreement were not stated in writing with sufficient certainty to satisfy the requirements of the statute of frauds.

The term "satisfactory bank guarantee" is likewise too uncertain to form a basis for that meeting of the minds which is necessary to constitute a contract.

In *Vitro Mfg. Co. v. Standard Chemical Co.* (Sup. Ct. Penn.), 139 Atl. 615, the court held:

> "A contract must arise from the acceptance of the last stated terms, and the acceptance must be identical, in order to bring the minds of the parties together."

The testimony of Martin J. Dinkelspiel, one of appellee's attorneys, discloses that it was necessary for the parties to confer *after* the telegrams had been sent in order to fix the amount that would constitute a satisfactory bank guarantee. Mr. Dinkelspiel testified that at the conference in his office on February 19, 1934, Edwards told Rothstein the meeting was for the purpose of getting the bank guarantee fixed up; that Edwards also told Rothstein that he estimated that he would have 20,000 crates of "bunch pack" asparagus and that on such an estimate he ought to have an

irrevocable letter of credit for $40,000.00 so that as shipments were made he could draw against appellants' bank. (Tr. pp. 112-113.)

In *Baird Investment Co. v. Harris* (C. C. A. 8th Cir.), 209 F. 291, the court stated:

> "An agreement within the statute [Statute of Frauds] will not be enforced in equity nor at law if it appears from the face of the agreement that any of the terms, no matter how unimportant they may seem to be, are left open to be settled by future conferences between the parties thereto. In such cases, there is no complete agreement."

> **That the court erred in admitting into evidence over defendants' objection and exception Plaintiff's Exhibit No. 3, consisting of a telegram sent by defendants to plaintiff, stating that defendants will arrange to guarantee payment for all bunch asparagus at the price mentioned and that plaintiff could draw up a contract between them in that said telegram did not constitute an acceptance of plaintiff's offer to sell asparagus to defendants. (Assignment of Error No. 13, Tr. p. 215.)**

From the foregoing authorities it is apparent that as appellants' telegram (Plaintiff's Exhibit No. 3) was not an unqualified acceptance of the offer contained in appellee's telegram (Plaintiff's Exhibit No. 2), and as the two telegrams did not show a meeting of the minds, the trial court erred in admitting appellants' telegram (Plaintiff's Exhibit No. 3) in evidence over the objection and exception of appellants. (Tr. p. 20.)

> **That the court erred in admitting into evidence over the defendants' objection and exception testimony of the plaintiff to the effect that there had been a prior oral agreement as to the terms of the alleged written contract except as to the price at which the asparagus was to be sold, in that plaintiff's cause of action was based solely upon a contract in writing. (Assignment of Error No. 12, Tr. p. 215.)**

That the court erred in denying defendants' motion to strike out the testimony given by the plaintiff to the effect that there had been a prior oral agreement as to the terms of the alleged written contract, to which an exception was noted, in that plaintiff's cause of action was based solely upon a contract in writing. (Assignments of Error No. 21, Tr. p. 218.)

Over the objection and exception of the appellants (Tr. p. 26) the trial court permitted appellee to testify to conversations had *prior* to and *after* the execution of the writings, to show in what sense the parties understood the words used in their respective telegrams, and to show what was meant by the words "satisfactory bank guarantee".

The testimony of appellee Edwards pertaining to conversations had with appellant M. H. Rothstein *prior* to the sending of the telegrams with reference to the type of asparagus being negotiated for, was as follows:

> "Mr. Dinkelspiel. Q. Mr. Edwards, directing your attention to the conversation testified to this morning at Isleton at that time between yourself and Mr. Rothstein, Mr. Krasnow being present, about the 10th of February, 1934, was anything said by you or Mr. Rothstein or both of you as to the type or kind of asparagus that was to be the subject matter of this sale?
>
> The Witness. He told Rothstein that he would ship the same quality of asparagus that was shipped to Rothstein through H. P. Garin & Co. in 1931 and 2. Rothstein said that was the quality they wanted; that the kind of asparagus shipped through Garin was bunched asparagus,—shipping—so far as he knew, and no other type of asparagus was shipped to the eastern market.

> Rothstein said it was to be shipped to the eastern market—Atlantic Seaboard."
>
> (Tr. pp. 25-26.)

The trial court denied the motion of appellants made at the conclusion of appellee's case to strike out all of the testimony of appellee in regard to the two telegrams (Plaintiff's Exhibits 2 and 3), which motion was made upon the ground that the telegrams contained all the writings passing between the parties. (Tr. p. 45.) The trial court also denied the motion of appellants made at the conclusion of the trial to strike the testimony of appellee upon the ground that said testimony related to a negotiation pertaining to a contract required by the statute of frauds to be put in writing, and that the evidence was irrelevant, incompetent and immaterial to prove the issues as presented by plaintiff's complaint. (Tr. pp. 172-173.) The court also permitted appellee to testify as to what he *intended* by using the words "all asparagus" in his telegram (Plaintiff's Exhibit No. 2), which testimony was permitted to remain in the record by the trial court. He testified that when he used the words "all asparagus" in his telegram (Plaintiff's Exhibit No. 2) he *meant* all shipping asparagus, and that shipping asparagus and bunch asparagus are practically the same thing as far as the trade is concerned; that at Isleton he discussed with Rothstein the specifications of the bunch asparagus, they were to be the same as the asparagus that had been shipped him through Garin, which had passed the State Department of Agriculture specifications. (Tr. p. 35.)

Appellee further testified that he used "all asparagus" in the offer in his telegram (Plaintiff's Exhibit No. 2) because at the time he previously sold asparagus to Garin and Rothstein, they bought the asparagus delivered to their packing shed at a certain price per pound and they packed it out themselves and did the bunching and grading themselves. In discussing the present transaction at Isleton it was understood Rothstein was going to do the bunching and packing himself and it would be the same quality shipped Rothstein before under the Garin contract. In asking Dinkelspiel to draw up a contract he told him that was the understanding with Rothstein and that was to be inserted in the contract Rothstein was to sign. (Tr. pp. 42-43.)

The trial court likewise permitted the following testimony by appellee as to what appellee told Rothstein he would have to give as a satisfactory bank guarantee, which conversation was had *prior* to the sending of the telegrams. Appellee testified that at the conversation at Isleton he told Mr. Rothstein that if he sold him the asparagus they would have to give a satisfactory bank guarantee to assure payment would be made for all of the asparagus that was shipped upon delivery of the documents to them or their representative, which Rothstein said would be done. (Tr. p. 18.) Appellee further testified that at the conference in Dinkelspiel's office he told Rothstein that the only way he knew of to guarantee these payments was to furnish a letter of credit on a reputable bank in the east guaranteeing his bank that the documents would be honored

upon presentation. At the time he had the conversation with Rothstein at *Isleton* he told him definitely in substance the same thing. (Tr. p. 32.)

The trial court also permitted to remain in the record the testimony of appellee as to what he told Rothstein, in Dinkelspiel's office, *after* the telegrams had been sent, as to what his requirements of a satisfactory bank guarantee were. Appellee testified that in the morning conference he told Rothstein that to conform with his requirements of a satisfactory bank guarantee he wanted the bank to guarantee that drafts up to the amount of $40,000.00 would be paid as the goods were shipped and documents delivered to Mr. Rothstein's representative. (Tr. p. 34.)

> That the court erred in permitting plaintiff to testify over the objection and exception of defendants that he believed he was obligated to deliver the asparagus to defendants on defendants furnishing him with a satisfactory guarantee, in that the plaintiff's belief as to his rights was immaterial to the determination of the existence of a contract and that the admission of such testimony permitted the jury to believe that plaintiff's belief was evidence of the existence of a contract. (Assignment of Error No. 16, Tr. p. 216.)
>
> That the court erred in stating in the presence of the jury, to which an exception was noted: ''The Court. There is no harm in hearing either one of them state he thought he made a contract or not. In other words, that doesn't pass upon the legality of a contract, but his attitude in connection with the testimony he is giving. I see no objection to that, because it is his personal attitude. I will allow it to stay in the record'', which statement was made after plaintiff and defendants had stipulated that the plaintiff's answer ''I did'' to the following question might go out of the record: ''Mr. Dinkelspiel. Q. After the receipt of the wire of February 13, 1934, from Mr. Rothstein, did you believe, as far as you were concerned you were bound under that obligation to deliver your asparagus to Mr. Rothstein on his furnishing you

with a satisfactory guarantee?" In that the statement of the court was tantamount to an instruction to the jury that the fact that the plaintiff thought he had obligated himself was evidence of the existence of a contract. (Assignment of Error No. 23, Tr. pp. 218-219.)

A glaring example of the error committed by the trial court in permitting the introduction of parol testimony is shown by the fact that the court permitted the appellee over the objection of appellants to testify that he believed that he was bound by reason of the telegrams received from Mr. Rothstein (Plaintiff's Exhibit No. 3) to deliver his asparagus to appellants on their furnishing appellee with a satisfactory guarantee. (Tr. p. 22.)

In other words, the trial court permitted appellee to testify as to his opinion and conclusion as to the effect of the two telegrams (Plaintiff's Exhibits 2 and 3) after his attorney had stipulated the answer could go out. The statement by the court in the presence of the jury that such testimony was admissible was clearly prejudicial to appellants for the reason that it was tantamount to an instruction to the jury that the fact that appellee thought he had obligated himself was evidence of the existence of a contract.

The trial court erred in admitting all of the parol testimony heretofore set forth and denying appellants' motion to strike the same. Although it is proper to permit parol testimony to *show* the meaning of words used in writings (*American Sugar Refining Co. v. Colvin-Atwell Co.,* 286 Fed. 685, supra), parol testimony is not admissible to show in what *sense* the parties to written instruments used certain words.

In *Wright v. Weeks,* 25 N. Y. 153, 160, plaintiff sued upon an alleged contract in writing. After the close of the testimony the court granted a motion to strike certain parol testimony, and held that the writing was not sufficient to comply with the statute of frauds. In a concurring opinion, Judge Allen stated:

> "The statute was passed to prevent fraud and perjury, in the establishment of fictitious or misrepresented contracts; and its object can only be effected by requiring not only the fact that such contract was made to be evidenced by writing, but that the contract itself, the entire agreement with all its terms and conditions, shall be in writing. * * * If the agreement be vague and indefinite, so that the full intention of the parties cannot be collected from it, it cannot be said that the contract is in writing, and it is therefore void. *If the parties have used abbreviations or technical terms, or terms of trade, evidence may be given, by parol, to show what meaning such abbreviations and terms had acquired, by usage and custom, but not in what sense the parties used them.*" (Italics ours.)

The Supreme Court of California has also held that parol evidence is not admissible to show in what sense the parties to written instruments used certain words.

> "To satisfy the statute of frauds a memorandum 'must contain the essential terms of the contract expressed with such degree of certainty that it may be understood without recourse to parol evidence to show the *intention of the parties.*' (5 Browne on Statute of Frauds, Sec. 371.)" (Italics ours.)
>
> *Seymour v. Oelrichs,* 156 Cal. 782, 787.

That the parol testimony of appellee as to what asparagus was to be shipped, and the monetary amount necessary to constitute a satisfactory bank guarantee was not admissible is shown by the case of *Hamby v. Truitt* (Ga.), 81 S. E. 593, wherein plaintiff commenced an action against defendant for an alleged breach of a written contract to purchase one hundred bales of cotton. Plaintiff thereafter sought to amend the complaint to set forth that the weight of said bales was to be 500 pounds each, and that it was agreed that the class of the cotton was to be middling. Neither of these provisions appeared in the written contract. The court refused the amendment and an appeal was taken. The court on appeal affirmed the decision and stated:

> "We think the court was undoubtedly right in disallowing the amendments, since the effect of the agreement alleged therein would have been to extend the written agreement by the addition of a parol agreement as to the weight of the bales of cotton and the quality or grade of the cotton to be supplied * * *."

The court pointed out that there was a difference between an amendment seeking to set forth an oral agreement made at the time the written contract was entered into and an amendment to show that the word "bale" meant in the trade 500 pounds of middling cotton, in which case there would be no attempt to vary the terms of the written contract, but would merely supply the actual trade meaning of the term or terms already in the contract.

To the same effect see *Stuart v. Cook* (Ga.), 45 S. E. 398, wherein the court stated:

> "Where some of the terms are in writing, and others in parol, the requirements of the statute are not met * * *."

The error of the trial court in permitting testimony by appellee that he had prior to the sending of the telegrams discussed with appellant, M. H. Rothstein, the fact that the grade of asparagus to be shipped to appellants was to be the same as that contained in the contract previously entered into with Mr. Garin (Defendants' Exhibit No. 5, Tr. p. 35) is shown by the case of *Turner v. P. Lorillard Co.* (Ga.), 28 S. E. 383, 384, wherein the alleged contract left the price blank. Plaintiff sought to introduce evidence to show the parties had dealt together for years and always sold at a stated price, subject to the discounts which were stated in the writing. Bills for other goods ordered by plaintiff from defendant were introduced in evidence, and parol evidence was offered to show the dealings between these parties, in order to complete the writings, and thereby complete the contract of sale. The court held that the contract was incomplete and that the price could not be supplied by parol evidence, and granted a nonsuit. On appeal the court in affirming the decision stated:

> "It is not necessary that the writing provided for in the section quoted shall contain in itself all of the requirements which the statute embraces. * * * If the writing, therefore, refer to any other writing, which can be identified completely by this

> reference, without the aid of parol evidence, then the two or more writings may constitute a compliance with the statute. If, however, two writings are relied upon to satisfy the statute, and parol evidence is necessary to connect them with each other, then they would fail as a compliance with the statute."

To the same effect see *Western Metals Co. v. Hartman Ingot Metal* Co. (Ill.), 135 N. E. 744, 746, wherein the court held:

> "Oral evidence is inadmissible to connect the several papers or show that they relate to the same transaction. Oral evidence can only bring together the different writings. It cannot connect them. They must show their connection by their own contents. The connection must be apparent from a comparison of the writing themselves."

The Supreme Court of California has stated the purpose of the statute of frauds in the following words:

> " 'The Statute of Frauds was originally enacted "for the prevention of frauds and perjuries" and an agreement * * * is required to be in writing in order that this purpose may be accomplished. The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parol evidence.' "
>
> *Seymour v. Oelrichs,* 156 Cal. 782.

The trial court also erroneously permitted appellee to give his opinion and conclusion as to whether or not he believed the entire contract between himself and

appellants was embodied in the two telegrams. (Plaintiff's Exhibits 2 and 3.) Appellee was allowed to testify that he considered that a sale had been made and that he considered that the two telegrams constituted an agreement. (Tr. p. 31.)

Furthermore, appellee testified that when he gave the telegrams to Dinkelspiel to draw up the contract, he told Dinkelspiel that he had sold the asparagus to Rothstein *in accordance with the arrangement made at Isleton,* and he simply wanted a memorandum of the agreement whereby payment would be guaranteed. (Tr. pp. 31-32.) This testimony showed that appellee was not relying upon the two telegrams (Plaintiff's Exhibits 2 and 3) to constitute the contract sought to be enforced against appellants, but that appellee was attempting to enforce an alleged oral contract agreed upon at *Isleton* prior to the transmission of the telegrams.

In *Jones v. Carver,* 59 Texas 293, the court stated:

> "In other words, it is claimed that, although the parties have never made a contract in such a manner as the law can recognize and the courts will enforce, yet that they, through parol evidence, should be permitted to establish such a contract as they ought to have made in writing, and that the courts ought to enforce it. This a court of equity does not do."

(3) The provisions of the alleged writings were not mutually binding upon both appellee and appellants.

This brings us to another fatal defect in the writings alleged by appellee to constitute a written contract.

Appellee's offer as heretofore stated was to sell all asparagus *shipped* by appellee. (Plaintiff's Exhibit No. 2.) If appellants' reply telegram (Plaintiff's Exhibit No. 3) be construed as an acceptance thereof, appellants agreed to purchase all asparagus *shipped*. It is a well settled principle of law that in order for writings to constitute a contract, they must be mutually binding upon both parties. Appellants ask this question: How much asparagus was appellee bound to *ship* during the time specified? Clearly from the wording of appellee's telegram (Plaintiff's Exhibit No. 2), appellee could have sold his asparagus on the local market and have declined to ship any asparagus to appellants. Appellants could not have sought specific performance, nor could they have alleged any breach on the part of appellee by failure to ship. A case similar to the facts presented herein, is that of *Hazelhurst Lumber Co. v. Mercantile Lumber & Supply Co.* (C. C. Mo.), 166 F. 191, wherein an action was commenced to recover damages for breach of a contract to purchase all ties that plaintiff could produce and *ship* to defendant until January 1, 1908. Plaintiff had agreed to sell defendant all ties it could produce and ship within that time. The court in sustaining a demurrer to the complaint stated that the contract was void for want of mutuality in that plaintiff did not assume any obligation legally enforceable against it. The court pointed out that plaintiff did not agree to ship any specified number of ties, that if an action had been commenced against plaintiff to enforce the contract plaintiff could have answered that it could not

produce any ties or that it could not procure cars to ship the ties, which answer would be a complete defense to the action.

To the same effect see *Ellis v. Denver L. & G. R. Co.* (Colo.), 43 Pac. 457.

(4) The writings disclose a counter-offer by appellants which amounted to a rejection of appellee's offer, and which counter-proposal was not accepted by appellee in writing.

Appellants' telegram (Plaintiff's Exhibit No. 3) was a counter-proposal to the offer contained in appellee's telegram (Plaintiff's Exhibit No. 3), in that although appellee's offer was to sell "all asparagus" appellants offered to buy "all bunch asparagus"; furthermore, whereas appellee requested a "satisfactory *bank* guarantee", appellants only agreed to arrange a "satisfactory guarantee".

> "A qualified acceptance is a new proposal."
> *Civil Code of California,* Sec. 1585;
> *Colton v. O'Brien,* 217 Cal. 551, 553;
> *Greenwich Bank v. Oppenheim,* 118 N. Y. S. 297, 299.

> "It seems to us self-evident that, if parties agree to deal on the basis of a rejected offer, the vendor's assent thereto, being an essential part of the contract, *must be in writing.*" (Italics ours.)
> *Lewis v. Johnson* (Minn.), 143 N. W. 1127.

Defendants' telegram (Plaintiff's Exhibit No. 3) was therefore a rejection of plaintiff's offer, and the counter-proposal contained therein could only be accepted by plaintiff in writing. This was never done.

II.

FATAL VARIANCE BETWEEN PROOF AND PLEADINGS.

The court erred in holding that there was any evidence of a contract upon the part of defendants sufficient to go to the jury in that the uncontradicted evidence discloses that plaintiff and defendants had never entered into a contract as alleged in plaintiff's complaint, or at all. (Assignment of Error No. 4, Tr. p. 213.)

A further objection and exception to the introduction of the telegram from the appellants to appellee (Plaintiff's Exhibit No. 3) was made upon the ground that the telegram did not conform to the allegations set forth in the complaint. (Tr. p. 20.) The complaint charged appellants with having breached a contract in writing "to buy all of the bunch asparagus to be thereafter *grown* by plaintiff during the 1934 season, and up to and including April 10, 1934." (Tr. p. 3.) The telegram from appellee to appellants (Plaintiff's Exhibit No. 2) offered to "confirm sale to H. Rothstein & Son of asparagus *shipped* from Golden State Asparagus Co. up to and including April 10, 1934." (Tr. p. 19.) Appellants offered to purchase all bunch asparagus *shipped* (Plaintiff's Exhibit No. 3; Tr. p. 21) therefore, even if it was conceded that appellants' telegram (Plaintiff's Exhibit No. 3) constituted an acceptance of appellee's offer, the telegram did not show the formation of any contract alleged in the complaint, namely, to purchase asparagus *grown* by plaintiff. Appellants, if they accepted any offer, accepted an offer to purchase asparagus *shipped*. There was therefore a failure of proof on the part of appellee to sup-

port the allegations of his complaint. A party cannot set up one cause of action and succeed upon proof of another cause of action, and, unless cured by amendment, a material variance between the pleadings and the proof is fatal.

49 *Corpus Juris* 804, Section 1187.

That this was not a minor variance is best illustrated by the fact that had appellee used the word "shipped" in his complaint instead of the word "grown" defendants could have demurred on the ground that the complaint did not state a cause of action and would have been spared the expense of a trial.

Hazelhurst Lumber Co. v. Mercantile Lumber & Supply Co., 166 Fed. 191, supra;

Ellis v. Denver L. & G. R. Co., 43 Pac. 457, supra.

In conclusion, appellants present this question: Can the following facts be ascertained from the face of the two telegrams (Plaintiff's Exhibits 2 and 3) alleged by appellee to constitute a written contract:

(1) How much asparagus appellee was bound to ship?

(2) Whether appellee and appellants were dealing with all of the asparagus belonging to appellee or just the bunch asparagus?

(3) Whether the appellants agreed to provide a satisfactory *bank* guarantee?

(4) What monetary amount constituted a satisfactory bank guarantee?

(5) Whether the telegrams referred to the contract, alleged in the complaint, namely, to purchase all asparagus *grown* by the Receiver?

(6) Whether appellants were bound to take asparagus not grown by appellee but purchased by appellee from other growers, if *shipped* to appellants?

III.

THE MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.

The court erred in denying defendants' motion for a directed verdict made at the conclusion of the trial in that plaintiff failed to introduce evidence sufficient to go to the jury in that the uncontradicted evidence offered by plaintiff and defendants disclosed that plaintiff and defendants had never entered into a contract for the sale of asparagus and that all negotiations had between plaintiff and defendants were preliminary to the execution of a written contract which was never executed and which negotiations were mutually abandoned. (Assignment of Error No. 2, Tr. p. 212.)

After appellee rested, appellants moved the trial court for a directed verdict upon the ground that it appeared that appellee had not proved the allegations in his complaint to the effect that appellants and appellee entered into a contract; that the evidence solely disclosed that the parties merely had some preliminary negotiations. (Tr. p. 45.) At the conclusion of the trial, appellants moved the trial court for an order directing the jury to return a verdict in favor of appellants (Tr. pp. 173, 174, 175), which motion included,

among others, the following grounds: That the evidence showed:

First. No contract in writing between the parties as alleged in the complaint.

Second. The parties merely negotiated for the sale of appellee's asparagus.

Third. The parties failed to negotiate a satisfactory arrangement as to the manner of payment.

Seventh. The telegrams (Plaintiff's Exhibits Nos. 2 and 3) did not contain all essential elements of a contract as they did not contain a mutual agreement as to the kind of asparagus to be sold and a mutual agreement as to the method of payment for the asparagus if sold. (Tr. pp. 173, 174, 175.)

As the question of whether or not the two telegrams (Plaintiff's Exhibits Nos. 2 and 3) constituted a written contract was a question of law for the trial court to determine (see authorities cited at page 12), and as the argument hereinabove set forth conclusively shows that the two telegrams did not constitute a contract in writing, it follows that the trial court erred in denying the motions of appellants made when appellee rested his case, and at the conclusion of the trial at which time an exception was noted. (Tr. p. 176.)

To illustrate that throughout the entire trial the trial judge was laboring under a misapprehension as to the law applicable to the facts presented to him, the attention of this honorable court is directed to the instruc-

tion given by the court to the jury that if they believed that appellee in sending his telegram (Plaintiff's Exhibit No. 2) *confirmed a verbal understanding* and that the appellants sent their telegram (Plaintiff's Exhibit No. 3) in acknowledgment of appellee's telegram and confirming the transaction, then the jury must find for appellee. (Tr. p. 183.)

The above instruction (Tr. p. 183) was clearly erroneous in that it instructed the jury in effect that irrespective of the contents of the two telegrams (Plaintiff's Exhibits 2 and 3), upon which appellee predicated his alleged cause of action, appellee and appellants had entered into a contract in writing, if the jury found that the parties by sending the telegrams *intended to confirm a prior verbal understanding.* The instruction was contrary to all of the authorities heretofore cited and the error of the court is best evidenced by the case of *Wright v. Weeks,* 25 N. Y. 153 (supra), wherein Chief Justice Denio stated:

> "* * * If a reference in writing to a verbal agreement would let in that agreement, where the subject was one which the statute required to be in writing, it would be sufficient for parties desiring to avoid the trouble of reducing their bargains to writing, to sign a statement that they had contracted verbally respecting a given subject, and they would thus dispense with the statute."

IV.

FAILURE OF PROOF OF ALLEGED DAMAGES.

The court erred in holding that there was sufficient evidence of damages suffered by the plaintiff to go to the jury in that the record discloses that plaintiff failed to prove the alleged damages suffered by him. (Assignment of Error No. 5, Tr. p. 213.)

Appellants contend that appellee failed to prove the damages allegedly suffered as a result of the alleged breach of contract, in that:

(1) Appellee failed to prove the total moneys received or to be received by him from the sale of the asparagus.

(2) Appellee failed to prove the market or current price of asparagus at the time or times when he claims appellants should have accepted delivery thereof.

There is no evidence that plaintiff suffered damages in the sum of seven thousand five hundred four and 02/100 dollars ($7,504.02), the verdict of the jury and the judgment entered herein, in that the undisputed evidence showed that plaintiff's records, ''Plaintiff's Exhibit 8'', upon which plaintiff relied to show damages, did not contain a true statement of all moneys collected and due plaintiff from the sale of the asparagus, the subject matter of this action. (Assignment of Error No. 8, Tr. p. 214.)

That the verdict and judgment are contrary to law in that the evidence is undisputed that the records of plaintiff, ''Plaintiff's Exhibit 8'', were incompetent to show alleged damages suffered by plaintiff in that it appears without contradiction from the evidence that:

(a) The pages offered in evidence were not the original, permanent and regular books of account kept by plaintiff.

(b) The said pages were prepared from figures and data not within the knowledge of plaintiff and were furnished to plaintiff by third persons not in the employ of plaintiff.

(c) The said pages did not constitute a true and correct report and account of moneys received and due to plaintiff from the sale of the asparagus, the subject matter of this action. (Assignment of Error No. 37, Tr. p. 226.)

In an attempt to prove the alleged damages suffered, appellee introduced in evidence over the objection and exception of the appellants (Tr. p. 141) 16 yellow pages bound together with string, with penciled entries thereon. (Plaintiff's Exhibit No. 8, Tr. p. 142.)

It is the contention of the appellants that the trial court erred in admitting these pages in evidence and that the trial court erred in denying the motion of appellants to strike the same from the record (Tr. p. 161), as no foundation was laid for the introduction of the pages in that:

(1) The pages did not show the total amount received by appellee from the sale of the asparagus, and were not appellee's permanent records of moneys received from the sale of the asparagus.

(2) The pages did not show the price for which the asparagus was sold, nor the grade of the bunch asparagus sold, and therefore it could not be ascertained therefrom whether the asparagus was sold at the market or current price.

Appellee testified that as a result of the failure of appellants to take the asparagus, he consigned the asparagus to one Roper, who shipped the asparagus to various agents in the east; that when an agent sold

the asparagus, the agent made up an *account sales,* which contained the same car number that Roper gave appellee when the shipment was made, and also showed the number of crates and the grade sold and the price; that the agent deducted the freight, the commissions, and any charges that the agent pays out on the other end, and sent appellee a check for the balance, together with the account sales showing what each grade was sold for. (Tr. p. 135.) The check received by appellee was for the *net* result arrived at by taking the gross sales, and deducting the charges which consisted of freight, precooling, commissions, and sometimes cartage. (Tr. p. 136.)

According to the yellow bound pages (Plaintiff's Exhibit No. 8) during the season of 1934, up to April 10th, appellee shipped 15,161 crates of bunch asparagus. The total price received f. o. b. Isleton was $22,547.85. (Tr. pp. 155-156.) If the asparagus had been sold at $2.00 a crate, $30,322.00 would have been received. The difference between $22,547.85 and $30,-322.00 is the amount claimed as damages suffered. (Tr. p. 24.)

In connection with the bound pages referred to above (Plaintiff's Exhibit No. 8) and the entries thereon, appellee testified that when the asparagus was shipped by Roper, Roper notified him each day that it was shipped and to whom, and appellee made a record of it as he received the notices from Roper. When the selling agent sold the asparagus and rendered appellee an *account of sales* showing the amount of money received for each individual shipment, he

recorded it (Tr. pp. 134-135), that the records (Plaintiff's Exhibit No. 8) are in the appellee's handwriting and are his permanent records. The entries were made at the time the asparagus was shipped and at the time appellee received payment, being made right along from day to day. The bound pages are regularly kept records.

In other words, although appellee in his complaint alleged that the market or current price of his asparagus at the time appellants should have accepted the same was $22,547.85, that sum in fact represented the money received by appellee for his asparagus from agents in the east after they had deducted various charges against same. These agents obtained the asparagus from Roper through whom appellee had consigned the same. The $22,547.85, therefore, did not represent the amount for which the asparagus was *sold* on the market. As will be hereafter shown, appellee admitted that the $22,547.85 was not even the entire amount of money received by him for the asparagus. Furthermore, no attempt was made by appellee to prove the amount for which the asparagus was sold on the market.

(1) Appellee's Exhibit No. 8 did not show all the money received from the sale of the asparagus and was not a permanent record of moneys received.

As heretofore stated, appellee in order to prove the damages allegedly suffered relied upon the figures contained in the bound pages. (Plaintiff's Exhibit No. 8.) From these pages, appellee testified that the

total amount received by him was the sum of $22,547.85. (Tr. pp. 155, 156.)

Appellee admitted upon cross-examination that he was familiar with the fact that claims were filed against the railroad with reference to asparagus shipped, that the claims were filed by the forwarder, that he received from Roper an accounting of the money received from the railroad company on the claims filed. Edwards testified that the bound pages (Plaintiff's Exhibit No. 8) *did not show all of the money which he received* from the sale, disposition or consignment of the asparagus. (Tr. p. 161.) Appellee further testified that in addition to the moneys set out in these bound pages there may have been $40.00 or $50.00, the exact amount he did not recall, representing collections on claims against the railroads. The receipts from the railroad claims were not entered on the pages as they were received probably a year thereafter. He further testified that he could not tell the amount received from the railroads without consulting other records which he did not have in court; that he could only make a guess as to the amount involved in the railroad claims; that his guess was based on what he had recovered in past years from claims against railroads and that to the best of his recollection the annual collection from railroad claims would not exceed $100.00. (Tr. pp. 161-162.)

The testimony above set forth shows without equivocation that appellee had received money from railroad claims in connection with the disposal of the 1934 asparagus crop, which money was not reflected

in the bound pages. (Plaintiff's Exhibit No. 8.) There was therefore a failure of proof as to the alleged damages suffered.

> That it appears from the face of the record that the verdict resulted from conjecture and chance in that there was no competent evidence introduced from which the jury could have found damages in the amount rendered in its verdict. (Assignment of Error No. 11, Tr. p. 214.)

That the testimony given by appellee over the objection and exception of appellants (Tr. p. 166) that the annual recovery from railroad claims would not exceed $100.00 was prejudicial to appellants, is shown by the fact that the jury in rendering its verdict relied upon the same and gave appellee judgment for the entire amount prayed for, less $100.00. (Based upon the above testimony, appellee consented that the amount prayed for in the complaint was to be reduced $100.00, making the same $7604.02. (Tr. p. 188.) The verdict of the jury was for $7504.02.)

> That the court erred in admitting into evidence over the defendants' objection and exception Plaintiff's Exhibit 8, consisting of sixteen (16) pages purporting to contain a record of the sales made by plaintiff's agents of asparagus shipped by plaintiff during the season of 1934, in that
>
> (a) Plaintiff's Exhibit 8 was not prepared by plaintiff from data or figures within his knowledge.
>
> (b) Said exhibit was prepared without the knowledge of defendants.
>
> (c) Said exhibit did not constitute a true and correct report and account of all moneys received by and due to plaintiff from the sale of the asparagus referred to in plaintiff's complaint; and
>
> (d) Said exhibit was not an original, permanent, and regular book of account kept by plaintiff. (Assignment of Error No. 14, Tr. p. 215.)

Although appellee testified that the bound pages (Plaintiff's Exhibit No. 8) were his permanent records of all *sales* during 1934 (Tr. p. 134), his testimony further showed that the bound pages were not his permanent records of *cash* received from the sale of the asparagus. (Tr. pp. 137, 139.) Appellee testified that the records produced in court (Plaintiff's Exhibit No. 8) were made in pencil by him, that after he made the entries thereon he turned it over to his bookkeeper, who entered the money received in a cash book kept in ink, which book was not produced in court. (Tr. pp. 136, 137, 138, 139.)

> "In my opinion, the ruling of the judge, with respect to the evidence in question, was clearly right. The ledger was a part of the party's own record of the matter in suit. In the case of *Prince, Executor, v. Swett,* 2 Mass. 569, it appeared from marks in the day-book, that the account had been transferred to the ledger, and the court said: 'When an account is transferred to a ledger from a day-book, the ledger should be produced, that the other party may have advantage of any items entered therein to his credit.' *To this extent, the rule seems to be undisputed; that is, the ledger is a necessary part of the proof when it affirmatively appears that it contains entries relative to the affair in suit.*" (Italics ours.)
>
> *Bonnell v. Mawha,* 37 N. J. Law. Rep. 198 (1874).

It is therefore apparent that the court erred in admitting the bound pages (Plaintiff's Exhibit No. 8) in evidence over the objection and exception of ap-

pellants that the same were hearsay, incompetent, irrelevant, not the best evidence, and not books of permanent record. (Tr. p. 141.)

> **That the court erred in denying defendants' motion to strike out Plaintiff's Exhibit 8, consisting of sixteen (16) pages purporting to contain a record of the sales made by plaintiff's agents of asparagus shipped by plaintiff during the season of 1934, to which an exception was noted, for the same reasons that the court erred in admitting said Exhibit 8 into evidence as more fully appears from Assignment of Error No. 14. (Assignment of Error No. 22, Tr. p. 218.)**

As appellee admitted that the bound pages (Plaintiff's Exhibit No. 8) did not show the entire amount of money received from the sale, disposition or consignment of the asparagus which appellee had negotiated for sale to appellants (Tr. p. 161), the trial court erred in denying the motion of appellants to strike same from the record, upon the ground that the same was incomplete, to the overruling of which motion an exception was noted. (Tr. p. 161.)

> "The preliminary proof showed that it was not a book kept in the usual course of business, containing *all the dealings* between the plaintiff and others, nor did it show all the dealings between the plaintiff and T. R. Landers, nor was there sufficient evidence of the correctness of the account. These book entries, therefore, do not rise in probative value above mere memoranda used to refresh the memory of a witness, as they fail in the foregoing essentials as a book of accounts. * * * These entries should not be considered of any probative value in determining whether or not there was sufficient proof to establish plaintiff's claim." (Italics ours.)
>
> *Tipps v. Landers,* 182 Cal. 771, 774.

"In order to entitle books of account to reception as evidence, it must appear that the party keeping and producing them is usually precise and punctilious respecting the entries therein, and that they are designed at least to *embrace all the items of the account* which are proper subjects of entry." (Italics ours.)

Countryman v. Bunker (Mich.), 59 N. W. 422.

"It is difficult to conceive of books of account, claimed to be correct as a basis for legal liability, which record only the debit side of an account."

Dugan v. Longstaff, 102 N. Y. Supp. 1120, 1121.

(2) Appellee's Exhibit No. 8 did not show the price for which the asparagus was sold nor the grade of the bunch asparagus sold, and therefore it could not be ascertained whether the asparagus was sold for the market or current price.

The bound pages (Plaintiff's Exhibit No. 8), furnish the following information: to whom the asparagus was shipped, the car numbers, the date shipped, the number of bunched and loose crates shipped, the alleged amount of net proceeds, and the date received. (Tr. pp. 142-151.) It is important to note that nowhere in the bound pages appears:

(1) The price the asparagus was sold for on the various eastern markets; and

(2) The classification of the bunch asparagus sold on the various eastern markets.

The importance of the failure of appellee to prove the amount for which the asparagus was sold on the eastern market and the classification of the said bunch

asparagus, is that without this proof appellee was unable to show that the market or current price of the asparagus was $22,574.84, as alleged in his complaint.

At this point, the court's attention is directed to the fact that *bunch* asparagus is classified into various grades and, as will hereinafter be pointed out, the different grades sell for different prices. H. P. Garin testified that there is a loose pack of asparagus and a bunch pack and *six grades of bunch pack,* the extra fancy, colossal, jumbo, fancy, select and extra select. (Tr. pp. 48-49.)

Section 1784 of the *Civil Code of the State of California,* reads as follows:

> "Action for Damages for Nonacceptance of the Goods. * * * (3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

In an endeavor to show damages in accordance with the provisions of the above code section, appellee alleged in his complaint "that at the times said asparagus would have been ready for delivery in accordance with the said contract there was an available market for the said goods and upon said market the market or current price for the said goods at the times when the same ought to have been accepted by defendants

was in the total sum of $22,547.85; that by reason of the premises and foregoing facts plaintiff has been damaged in the sum of $7774.15." (Tr. p. 4.)

> There is no evidence that the price received by plaintiff for bunched asparagus, the subject matter of this action, was the then prevailing market price, in that there was no competent evidence of the then prevailing market price. (Assignment of Error No. 9, Tr. p. 214.)
>
> The court erred in admitting into evidence over the defendants' objection and exception Plaintiff's Exhibit No. 9, which consists of papers entitled "The Federal Market News" and purporting to show the market value of the asparagus sold by plaintiff at the time of the sale thereof, in that said papers were not certified as authentic by the United States Department of Agriculture. (Assignment of Error No. 15, Tr. p. 216.)

So as to attempt to show that the prices for which the bunch asparagus was sold was the market or current price, appellee testified that at the time he made the entries in the bound pages (Plaintiff's Exhibit No. 8) and, in particular, the entries having to do with the net receipts, he made inquiry to ascertain the market price at which the goods were sold on the date of sale, that during the period he was shipping the asparagus he received bulletins from the Department of Agriculture showing the sales made in the different markets on the different days and as he got these reports of sales he referred to the bulletin to see whether his agents were getting the average price as compared with the price recorded by the Department of Agriculture (Tr. p. 151), that the bulletins received by him were the "Federal State Market News Service", which he obtained daily in his business of operating the Golden State Asparagus Company from the United

States Department of Agriculture, Bureau of Agricultural Economics, Ferry Building, San Francisco, California (Tr. p. 152), that he compared his returns of sale in the various markets in so far as he was able with the figures shown on the original reports that he received from the Department of Agriculture.

Over the objection and exception of appellants that the Federal State Market News Service, which consisted of 54 mimeographed pages, were hearsay, incompetent, irrelevant, immaterial, not the best evidence, and not certified documents as required under the law, the court admitted the same in evidence. (Tr. pp. 154, 167.) The court erred in admitting the Federal State Market News Service (Plaintiff's Exhibit No. 9) in evidence in that it was not admissible in evidence unless authenticated.

> "Copies of any books, records, papers or documents in any of the executive departments authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof."
>
> 28 *U. S. C. A.,* Section 661.

If we concede that the mimeographed pages (Plaintiff's Exhibit No. 9) were properly introduced in evidence, an examination thereof discloses that the market prices quoted in said exhibit are the prices for which certain classifications of bunch or loose asparagus were sold. For example, the pages show that on February 26, 1934, in Boston, the different grades of bunch asparagus sold per crate as follows: Extra select \$5.50-\$6.50; Select \$5.00-\$6.00; Extra fancy \$4.00-

$4.50; Fancy $3.00-$4.00. (Tr. pp. 142-151.) As heretofore stated, an examination of the yellow bound pages (Plaintiff's Exhibit No. 8) discloses that on certain dates appellee shipped a certain number of bunched crates of asparagus, but nowhere does it appear how many crates of the various grades of bunch asparagus were shipped.

Appellants attempted to examine appellee to ascertain the quality of asparagus falling into the various classifications of bunch asparagus enumerated in the yellow bound pages (Plaintiff's Exhibit No. 8) in order that appellants could compare the grade of bunch asparagus sold by appellee and the price received therefor with the grades and prices contained in the mimeograph sheets (Plaintiff's Exhibit No. 9), upon which appellee was relying to prove market value. The trial court erroneously sustained objections to appellants' questions, and an exception was noted. (Tr. pp. 158-159.)

As the yellow bound pages (Plaintiff's Exhibit No. 8) showed only the *net* proceeds received by appellee from the various agents in the east after the agents deducted freight, commissions, sometimes cartage, and precooling, and the amount of these charges is not set forth in the bound pages (Plaintiff's Exhibit No. 8), it follows that appellee failed to prove that the sum of $22,547.85, which is the total amount shown on the bound pages (Plaintiff's Exhibit No. 8) alleged to have been received by him, was the market or current price for the asparagus, less proper charges as aforesaid, at the time the asparagus ought to have been

accepted by appellants as alleged in the complaint. (Tr. p. 5.)

In an attempt to prove the allegation in his complaint that the sum of $22,547.85 represented the market or current price of the asparagus at the time it was sold, appellee was erroneously permitted to testify by the trial court over the objection and exception of appellants, that the reports (Plaintiff's Exhibit No. 9) showed that the prices he received were in line with the prices mentioned in the reports. (Tr. pp. 153-154.)

The testimony of appellee merely expressed his opinion and conclusion and therefore was not admissible. Furthermore, the testimony was not supported by the documentary evidence. As heretofore pointed out the bound pages (Plaintiff's Exhibit No. 8) could not be compared or reconciled with the Federal Market News Service. (Plaintiff's Exhibit No. 9.) The reasons for this may be summarized as follows: The bound pages (Plaintiff's Exhibit No. 8) disclosed the net amount received by appellee and *did* not disclose the grade of the bunch asparagus shipped. The Federal Market News Service (Plaintiff's Exhibit No. 9) disclosed the price for which the various classifications of bunch asparagus were sold on various markets. It is therefore apparent that it is impossible from an examination of both Exhibits 8 and 9 to ascertain

(1) What the market or current price of appellee's asparagus was on the day that appellants allegedly should have accepted same.

(2) Whether the price appellee's asparagus was sold for on the eastern market was the market or current price.

It is obvious that appellee attempted to prove the difference between the market or current price and the alleged contract price, by merely showing the difference between the *net* amount received by him and the alleged contract price. No proof was introduced to show what the asparagus was sold for on the market and what charges were deducted therefrom in order that the court and jury could determine whether the asparagus was sold for the market or current price and whether a correct accounting was made to the appellee in connection therewith. Furthermore, appellee admitted that the bound pages did not show the entire *net* amount received by him. (Tr. p. 161.)

The only records that could be compared with the Federal Market News Service (Plaintiff's Exhibit No. 9) were the *account sales* rendered to appellee by the various agents in the east, which account sales showed the grade of asparagus sold, the price obtained and the various charges against the asparagus deducted by the agent. (Tr. p. 136.) The account sales were not offered in evidence. If we assume that the Department of Agriculture reports (Plaintiff's Exhibit No. 9) were properly in evidence, the account sales, if produced, could have been compared with the news service to ascertain if the market price had been obtained for the asparagus. Appellee testified that the account sales as rendered to him by the agents had not been de-

stroyed, were still in his possession, and kept as permanent records. (Tr. pp. 137-138.) As appellee admitted that the bound pages (Plaintiff's Exhibit No. 8) did not contain all of the moneys received by him from the disposition of the asparagus (Tr. p. 161), and that he had a cash book (Tr. p. 139), the cash book was the only competent evidence to show the amount received. The cash book if produced could have been compared with the account sales, if produced, to determine whether the checks received by appellee from the agents and entered in the cash book checked with the amounts shown on the account sales to be due to appellee. The account sales would also have shown whether appellee erred in copying the net return shown thereon upon the bound pages. (Plaintiff's Exhibit No. 8.)

That the yellow bound pages (Plaintiff's Exhibit No. 8) were not competent evidence to prove damages in the absence of the account sales, is shown by the case of *Sugar Loaf Orange Growers Ass'n v. Skewes,* 47 Cal. App. 470, the facts of which case are identical with those at bar. Plaintiff, a growers' association, sued the defendant upon an open book account. The defendant had delivered his oranges to plaintiff, who in turn had disposed of the oranges through the Mutual Orange Distributors Co., which distributors company rendered to plaintiff an *account sales* showing the receipts from the sale of the oranges and the charges for freight, refrigeration and auction commission. A witness for the plaintiff testified that he had made up the ledger account from the account sales. The defend-

ant objected to the introduction of the ledger in evidence and particularly to that part referring to the account sales. The court in affirming the decision of the lower court admitting the ledger account into evidence stated:

> "* * * In connection with the cross-examination of Mr. Wolever [plaintiff's witness], the defendant called for the said accounts of sales furnished to plaintiff by the Mutual Orange Distributors and introduced them in evidence. They are in the record as defendant's exhibit 'R', and *correspond* in amounts to the entries contained in the ledger account. No evidence to contradict them was offered by the defendant. *It appears to us that if there was any error in the reception of the ledger account in evidence as covering these items of the 'account sales', such error is cured by the introduction in evidence of said exhibit 'R' at the instance of the defendant himself.* Having been received by the plaintiff in the usual course of business, they constituted a reasonable basis of authority to the plaintiff to pay out the balance charged to it on the loss incurred by the sales and to charge to the defendant the amount so paid out by the plaintiff for his account. Considered in this light, the ledger entry itself may be regarded as the original entry of the account of the plaintiff against the defendant." (Italics ours.)

In the instant proceedings, the yellow bound sheets (Plaintiff's Exhibit No. 8) were not even a copy of the "account sales", but merely showed the alleged net return to appellee (which appellee admitted was not complete; Tr. p. 161).

That the court erred in admitting into evidence over the defendants' objection and exception Plaintiff's Exhibit 8, consisting of sixteen (16) pages purporting to contain a record of the sales made by plaintiff's agents of asparagus shipped by plaintiff during the season of 1934, in that

(a) Plaintiff's Exhibit 8 was not prepared by plaintiff from data or figures within his knowledge.

(b) Said exhibit was prepared without the knowledge of defendants.

(c) Said exhibit did not constitute a true and correct report and account of all moneys received by and due to plaintiff from the sale of the asparagus referred to in plaintiff's complaint; and

(d) Said exhibit was not an original, permanent and regular book of account kept by plaintiff. (Assignment of Error No. 14, Tr. p. 215.)

The above assignment of error has been heretofore argued upon the point that the court erred in admitting the yellow bound pages (Plaintiff's Exhibit No. 8) in evidence for the reason that the same did not contain a statement of all moneys received by appellee from the disposition of his asparagus. (See Brief, p. 44.) However, even if the bound pages (Plaintiff's Exhibit No. 8) purported to show a statement of all moneys received by appellee from the disposition of the asparagus (appellee admitted that they did not; Tr. p. 161), and even if the bound pages purported to show an exact copy of the contents of the account sales (and they did not), the bound pages were not admissible in evidence over the objection and exception of appellants (Tr. p. 141), as appellee admitted that his cash book, which was not produced in court, disclosed the moneys received by him (Tr. p. 139) and furthermore, that the account sales were still in his possession

although not produced in court, and constituted part of appellee's permanent records. (Tr. p. 138.)

> "Not only was this copy of the bill of particulars not the best evidence, but no necessity existed for its introduction, for it conclusively appears that the document was transcribed from order sheets, payrolls, and other data constituting a book of original entry * * * in the possession of plaintiff and which he might have produced, thus giving defendant and the court an opportunity to examine it, in order to determine its integrity and correctness and giving to plaintiff an opportunity to explain any errors or discrepancies therein affecting its weight as evidence. We are referred to no authority, and we know of none, holding that a party to an action may copy a book of original entry in his possession, withhold the original and prove his case by introducing such copy in evidence, while, on the contrary, numerous authorities hold such ruling to be error."
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> *Campbell v. Rice*, 22 Cal. App. 734, 736.
>
> "* * * The bookkeeper testified that the ledger items were taken from a cash-book and cost sheets. We need not consider the cash-book since it is admitted that the payments made on account were correctly credited. The question then is whether the ledger was properly admitted, *when the cost sheets might have been produced as the primary and best evidence.* The bookkeeper said in substance: 'These items charged in the ledger are taken from slips handed me by the cost clerk. As the work goes on the workmen turn in their records and we take them from those slips. These items are correctly taken from the charges made

on the slips showing actual time and valuation of materials furnished. But I do not know whether the statements themselves are correct. I entered from the cost sheet into the ledger and it is a copy of the cost sheet.' The salesman testified that when the goods were sold (referring to the $490.71 item), he placed the order in a book. 'That book has been destroyed' * * * On cross-examination by defendant's counsel, he further testified that the figures which he had written in that book showed the price as made to Mr. Dunn, 'the same as was copied on the cost sheet'. *The facts thus shown in evidence were not sufficient to constitute the foundation necessary to authorize the admission of the ledger.*" (Italics ours.)

Preston v. Dunn, 33 Cal. App. 747.

"While the plaintiff, to prove some of the items of the account, put in evidence memoranda with the defendant's signature attached, as to the other items the only offer of proof was a book alleged to have been kept by the plaintiff in the usual course of his business. This book was kept by a clerk in the office of the hotel, who had no personal knowledge of the items of goods sold by the cigar department and the bar department of the plaintiff's hotel, and whose only knowledge was derived from slips sent to his office from these departments by a bell boy. *The original slips were not produced,* and neither of the employes who had charge of the bar or the cigar department was called to testify. Under these circumstances, we are of the opinion that the judge erred in admitting the book in evidence." (Italics ours.)

Gould v. Hart (Mass.), 73 N. E. 656.

"A custom has grown up in some parts of this state, which seems to have been followed in the present case, of giving in evidence copies of accounts, proved by witnesses to have been correctly transcribed from the books, * * * It is going quite far enough to permit the original book itself, after being inspected by the court, and subjected to the scrutiny of the opposite party, to go as evidence to the jury, and in no other way can the credit due to such testimony be properly estimated."

Moody v. J. M. Roberts Co., 41 Miss. 74.

To the same effect see

Halstead v. Cuppy, 25 N. W. 820 (Iowa).

Dodge v. Morrow, 43 N. E. 153, 154 (Ind. App.), affords an excellent summary of the soundness of the authorities relied upon herein to support appellants' contention that Plaintiff's Exhibit No. 8 was inadmissible to prove the appellee's alleged damages. The court stated in connection with the admission of books into evidence:

"* * * This class of testimony is capable of great abuse, and might often be used to work injustice. Its admission is therefore carefully guarded. In some of the states it is limited as to the amount, and is generally made dependent upon certain conditions * * * *Necessity lies at the foundation of such admission. It is only to be resorted to when no other or better means of making the proof is obtainable. When the transaction admits of more satisfactory evidence, this method should not be resorted to* * * * *But we are clear that such entries are not admissible unless the*

necessity therefor is shown. It was not made to appear that better evidence was not obtainable, or that the transactions did not admit of more satisfactory evidence. In fact it was made to appear that other persons were present, who knew something about some of the transactions. These persons were not called, nor was it shown that their memories had failed." (Italics ours.)

The court erred in denying defendants' motion for a directed verdict made at the conclusion of the trial in that plaintiff failed to introduce evidence sufficient to go to the jury in that plaintiff failed to introduce competent evidence to prove the alleged damages suffered by him. (Assignment of Error No. 3, Tr. p. 213.)

From the foregoing authorities it follows that appellee failed to prove the alleged damages for the reason

(1) The yellow bound pages (Plaintiff's Exhibit No. 8) were not admissible in evidence to prove the amount of the damages, in that

(a) The pages did not reflect all moneys received by appellee from the disposition of the asparagus.

(b) The pages did not show either the price for which the asparagus was sold or the grade of bunch asparagus sold.

(2) The Federal Market News Service (Plaintiff's Exhibit No. 9) was not admissible in evidence to show the market value of the asparagus, in that the same was not authenticated as required by law.

Even assuming for the purpose of argument that both Exhibits 8 and 9 were properly admitted in evi-

dence, appellee failed to prove damages in that the exhibits could not be compared or reconciled to determine whether the amount received by appellee represented the market value, for the reason that the Federal Market News Service (Plaintiff's Exhibit No. 9) disclosed the prices for which different grades of bunch asparagus were sold on various eastern markets and the yellow bound pages (Plaintiff's Exhibit No. 8) did not disclose either the grade of bunch asparagus shipped by appellee or the amount for which the asparagus was sold. The trial court therefore erred in denying the motion of appellants for a directed verdict made at the conclusion of the trial on the ground that appellee had failed to prove the alleged damages suffered by him, to the denying of which motion an exception was noted. (Tr. p. 176.)

CONCLUSION.

It is respectfully submitted that the judgment of the United States District Court in and for the Northern District of California should be reversed.

Dated, San Francisco,
April 12, 1937.

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